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STALLMAN V. YOUNGQUIST: THE ILLINOIS SUPREME COURT REJECTS MATERNAL CIVIL LIABILITY

INTRODUCTION

The Illinois Supreme Court, in *Stallman v. Youngquist*,[1] recently addressed a fetus's right to sue its mother for the unintentional infliction of prenatal injuries. The court refused to recognize any such cause of action, a refusal which may shock those who have fervently written for the imposition of maternal civil and criminal liability for a woman's prenatal acts.[2]

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1. 125 Ill. 2d 267, 531 N.E.2d 355 (1988).

2. For a discussion on imposing maternal civil liability, see Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to the Child Born Alive*, 21 SAN DIEGO L. REV. 325 (1984) (arguing that the expanding legal status of the fetus and the increasing trend to abrogate state parent-child tort immunity doctrines forms the basis for allowing a fetus to sue its parents for negligence); Shaw, *Conditional Prospective Rights of a Fetus*, 5 J. LEGAL MED. 63 (1984) (asserting that once a woman has decided to carry a pregnancy to term the inference in *Roe* is that she then incurs liability for any negligent harm inflicted upon the fetus); Comment, *Parental Liability for Preconception Negligence: Do Parents Owe a Legal Duty to Their Potential Children?*, 22 CALIF. L. REV. 289 (1986) [hereinafter Comment, *Parental Liability for Preconception Negligence*] (concluding that recognition of a child-parent cause of action for preconception negligence is necessary and proper).

For a discussion on imposing criminal liability, see Comment, *Criminal Liability of a Prospective Mother For Prenatal Neglect of a Viable Fetus*, 9 WHITTIER L. REV. 363 (1987) [hereinafter Comment, *Criminal Liability of a Prospective Mother*] (concluding that a viable fetus possesses the same rights and protections as all human beings and therefore proposing that criminal liability should be imposed upon a pregnant mother who arbitrarily and needlessly endangers the health and safety of her viable fetus); Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47 (1978) [hereinafter Note, *Parental Liability*] (supporting the imposition of civil liability on parents once they are or should be aware of pregnancy); Note; *Developing Maternal Liability Standards For Prenatal Injury*, 61 ST. JOHN'S L. REV. 592 (1987) [hereinafter Note, *Developing Maternal Liability Standards*] (concluding that a child's right to be born healthy justifies the imposition of a duty on a pregnant woman to refrain from injurious conduct and recommending the imposition of both maternal civil and criminal liability).

But see Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987) (state has no basis for imposing criminal or civil liability on women for their prenatal acts); Singer, *Maternal Smoking and Fetal Injury: Medical, Legal, and Societal Consequences*, 21 J. HEALTH & HOSP. L. 153 (July, 1988) (concluding that it is unlikely that any court could impose judicial sanctions for such a widespread practice as smoking); Note, *The Pamela Rae Stewart Case and Fetal Harm: Prosecution or Prevention*, 11 HARV. WOMEN'S L.J. 227 (1988) [hereinafter Note, *The Pamela Rae Stewart Case*] (discusses California's unsuccessful attempt to impose criminal liability for a woman's prenatal acts and explains why criminalization is not the solution); Note, *A Maternal Duty to Protect Fetal Health?*, 58 IND. L.J. 531 (1983) [hereinafter Note, *Maternal Duty?*] (practical considerations require that courts deny absolute enforcement of a maternal duty).

By tracing the development of fetal rights over the past one hundred years, proponents for imposing maternal liability have concluded that "logic and justice" demand such a result.[3] However, in refusing to recognize the fetus's cause of action, the *Stallman* court cautioned that such an action would have far-reaching implications for women's constitutional rights. The court concluded that to recognize such fetal rights and correlative maternal duties would make the woman the guarantor of her child's mind and body.[4] Thus, mother and child would be legal adversaries from the moment of conception until birth.[5] The *Stallman v. Youngquist* opinion addresses several major issues. First, although the court recognized that a fetus may assert a right to be born whole against a third party, it refused to recognize such rights against the mother.[6] The court concluded that the fetus was not an entirely separate legal entity from its mother, and therefore reasoned that the fetus's legal status did not include the right to assert a legal claim against its mother.[7] Second, the court addressed the issue of whether the mother has a legal duty to the fetus. The court refused to recognize such a common law duty, and instead deferred the maternal civil liability issue to the legislature.[8] Last, the court addressed the potential conflict between a woman's privacy rights and a fetus's right to be born whole. The court expressed concern for potentially excessive state intrusion into women's everyday lives if the court recognized such a cause of action.[9] In addressing this concern, the court discussed broad policy issues, including the protection of women's rights and the state's interest in protecting the fetus. The court stated these policy issues could serve as guidelines for any legislative action.[10] However, the court stressed prevention rather than imposition of civil liability as the sounder course, and stated the way to effectuate the birth of healthy babies was not through after-the-fact civil liability in tort, but rather through before-the-fact education of all women and their families.[11]

This Note will trace the historical expansion of fetal rights from the original common law rule preventing recovery for prenatal negligence to

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3. Advocates of imposing maternal civil and criminal liability argue that such liability is the logical extension of the trend to expand fetal rights and to abrogate parent-child tort immunity doctrines.

4. Stallman v. Youngquist, 125 Ill. 2d 267, 276, 531 N.E.2d 355, 358 (1988).

5. *Id.*

6. *Id.* at 275-76, 531 N.E.2d at 359. The court concluded that if a fetus's right to a sound mind and body were asserted against its mother, the mother would become the guarantor of the child's mind and body. The court noted that a legal duty to guarantee the mental and physical health of another has never been recognized in law. *Id.*

7. *Id.* at 278-79, 531 N.E.2d at 360.

8. *Id.* at 279-80, 531 N.E.2d at 361. While the court deferred to the legislature, it stressed that any such legislative decision must come only after thorough investigation, study and debate because of the far-reaching implications on a woman's right to privacy and autonomy.

9. *Id.* at 277-78, 531 N.E.2d at 360-61.

10. *Id.* at 280, 351 N.E.2d at 361.

11. *Id.* at 279-80, 531 N.E.2d at 361.

the current rule which allows recovery for prenatal injury from third party tortfeasors. Because the *Stallman* court analyzed a case of first impression, this Note will draw analogies from cases which attempted to impose criminal liability on mothers for prenatal fetal injury. Furthermore, the Note will identify the competing rights and interests involved in maternal liability and will draw analogies from appropriate case law addressing fetal rights, women's constitutional rights, and the state's interest in the fetus. The Note will also discuss the *Stallman* decision's effect on women's privacy, fetal well-being, and maternal criminal liability.

I. BACKGROUND

A. Historical Trends in the Fetus's Legal Status

1. No Common Law Recognition for a Cause of Action for Prenatal Negligence

A hundred years ago, a fetus was considered a part of its mother. In *Dietrich v. Northhampton*,[12] Justice Holmes held that there was no common law recognition of a cause of action in tort for prenatal injuries. This denial was based on the belief that the fetus was merely a part of the mother at the time of injury.[13] In Illinois, this common law rule was enunciated in *Allaire v. St. Luke's Hospital*,[14] where the Illinois Supreme Court held that no cause of action existed for injuries to a fetus even though the injuries occurred only a few days prior to birth. In *Allaire*, a pregnant woman was injured in a hospital elevator and sustained multiple fractures. The infant was born four days later with the left side of his body severely bruised and atrophied resulting in permanent left-sided paralysis.[15] The court refused to recognize the cause of action, stating that the fetus was a part of its mother.[16]

A dissenting opinion in *Allaire* later became highly influential in reversing the common law rule preventing recovery for prenatal negligence.[17] In his dissent, Justice Boggs suggested that it was an obvious fallacy to conclude that no injury had occurred to the person of the fetus.[18] Justice Boggs concluded that a child should have a cause of action in negligence whenever

12. 138 Mass. 14 (1884).

13. *Id.* at 16.

14. 184 Ill. 359, 56 N.E. 638 (1900).

15. *Id.* at 362, 56 N.E. at 639.

16. *Id.* at 368, 56 N.E. at 640. "That a child before birth is, in fact, a part of the mother and is only severed from her at birth, cannot, we think, be successfully disputed." *Id.*

17. The following cases relied on Justice Boggs's dissent as the basis for changing the *Dietrich* rule: Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

18. *Allaire*, 184 Ill. at 374, 56 N.E. at 642 (Boggs, J., dissenting).

a child was injured in utero and was so far advanced as to be viable.[19]

2. *Common Law Recognition of a Prenatal Negligence Claim Against Third Parties*

The common law rule prohibiting prenatal negligence claims was followed until 1946. In 1946, the District Court for the District of Columbia, in *Bonbrest v. Kotz*,[20] recognized a cause of action for prenatal injuries inflicted by a third party on a viable fetus, subsequently born alive.[21] After *Bonbrest*, the majority of jurisdictions reversed their earlier holdings and allowed a cause of action for prenatal injury.[22]

The *Bonbrest* court articulated two requirements for establishing a claim. First, the child had to be born alive, and second, the injury must have occurred after viability.[23] Subsequent court decisions, however, slowly eroded these requirements.[24] Presently, thirty-five jurisdictions do not require the "born alive" element.[25] These jurisdictions reasoned that the born alive requirement more harshly punished a tortfeasor who merely caused injuries than a tortfeasor who caused fetal demise.[26] Furthermore, several states, including Illinois, have abandoned the viability requirement as an artificial demarcation.[27]

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19. *Id.*

20. 65 F. Supp. 138 (D.D.C. 1946).

21. *Id.* at 142.

22. Tucker v. Howard L. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E.2d 909 (1951); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Verkennes v. Gorniea, 229 Minn. 35, 38 N.W.2d 838 (1949); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Jasinsky v. Potts, 153 Ohio 529, 92 N.E.2d 809 (1951).

23. 65 F. Supp. 138, 142 (D.D.C. 1946). The *Bonbrest* court defined a viable child as "one capable of living outside the womb." The Supreme Court, in Roe v. Wade, 410 U.S. 113, 160, (1972), defined viability as the point at which a fetus is potentially able to live outside the mother's womb, albeit with artificial aid. The Supreme Court recognized viability as generally occurring at twenty-eight weeks, but noted it could occur as early as twenty-four weeks.

24. Eventually, the born alive requirement was eliminated as being unfair because it allowed the tortfeasor who actually caused fetal death to escape liability. *See* Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974); Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985) (en banc); Greater Southeast Community Hosp. v. Williams, 482 A.2d 394 (D.C. 1984); Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982); Mone v. Greyhound Lines Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); Pehrson v. Kistner, 301 Minn. 299, 222 N.W.2d 334 (1974); Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 425 A.2d 92 (1980).

25. *See* Note, *Developing Maternal Liability Standards, supra* note 2, at 595 n.14.

26. *Id.* at 595.

27. *See, e.g.* Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 353, 367 N.E.2d 1250, 1253 (1977); Torigian v. Watertown News Co., 352 Mass. 446, 448-49, 225 N.E.2d 926, 927 (1977); Simon v. Mullin, 34 Conn. Supp. 139, 147, 380 A.2d 1353, 1357 (Super. Ct. 1977). In *Renslow*, the court noted that the viability requirement was an artificial and unsatisfactory criterion because viability was a relative matter which depended on the race, weight, and stage of fetal development, the health of the mother and the child, and the available life-sustaining techniques. 67 Ill. 2d at 352, 367 N.E.2d at 1252. The standard of what constitutes viability for

It was not until 1953 that the Illinois Supreme Court, in *Amann v. Faidy,*[28] overruled the *Allaire* holding and recognized a child's cause of action for prenatal negligence. In *Amann*, the court noted that many legal scholars had decried the illogical basis for denying prenatal negligence actions.[29] Relying on these scholarly studies, and on case law subsequent to *Allaire,* the court concluded that the reasons which had been advanced in support of the doctrine of nonliability were unpersuasive.[30] Furthermore, the court rejected problems of proof as a legitimate basis for denying a cause of action, and overturned *Allaire.*[31] The same year *Amann* was decided, the Illinois Supreme Court also upheld an action for prenatal negligence for injuries sustained by a viable fetus and subsequently born child.[32]

Twenty years later, Illinois abandoned the necessity of a live birth before allowing a prenatal negligence claim. In *Chrisafogeorgis v. Brandenberg,*[33] the Illinois Supreme Court held a wrongful death action could be maintained on behalf of a stillborn child. Relying on the *Amann* decision, the court concluded that difficulty in determining damages should not operate as a legal bar to a cause of action.[34]

In eliminating the live birth requirement, the court looked to other jurisdictions which found it was illogical to permit a cause of action to a subsequently born child but to deny a prenatal negligence claim where the injury was so significant that it caused fetal death.[35] Thus, the court

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tort purposes is essentially the same as was articulated in *Roe.* As medical technology pushes viability back to earlier prenatal periods, the available time period for abortion may change. It was because of this changing standard of viability that some courts, including those in Illinois, decided that the viability requirement was an artificial and unnecessary standard.

28. 415 Ill. 422, 114 N.E.2d 412 (1953).

29. *Id.* at 427, 114 N.E.2d at 415.

30. *Id.* at 432, 114 N.E.2d at 416. The primary reasons for preventing recovery were the lack of precedent, the difficulty of determining the existence of a causal relationship, and the absence of a duty to the unborn child. The court concluded there was case law recognizing fetal rights in certain circumstances, such as the will and inheritance cases, as well as certain admiralty laws. Second, the difficulty in determining proof did not preclude a remedy, and should prompt greater leniency in allowing a claim. Finally, the court believed that concluding a viable fetus had no separate existence would be to deny a simple and easily demonstrable fact. *Id.*

31. *Id.* at 432, 114 N.E.2d at 417-18. The court, therefore, overturned *Allaire* and permitted a wrongful death action of an infant born alive but who died due to a prenatal injury by a third party.

32. Rodriquez v. Patti, 415 Ill. 946, 114 N.E.2d 721 (1953). The plaintiff sought to recover for prenatal injuries. The trial court dismissed, and the appellate court affirmed based on *Allaire.* However, since the Illinois Supreme Court overruled *Allaire* in *Amann, Rodriguez* was reversed and remanded.

33. 55 Ill. 2d 368, 304 N.E.2d 88 (1973).

34. *Id.* at 372, 304 N.E.2d at 90.

35. *Id.* at 373-75, 304 N.E.2d at 91-92. The court quoted from one jurisdiction which had stated that they were "unable to reconcile the two propositions, that if the death occurred after birth there is a cause of action, but that if it occurred before birth there is none," and

concluded that "logic" required the recognition of a cause of action for the wrongful death of a stillborn, as well as the death of an infant.[36] Additionally, the *Chrisafogeoris* court noted that a significant reason for allowing a wrongful death cause of action for the death of a stillborn child was the fetus's existence separate and independent of its mother.[37] The court found that the elimination of the live birth requirement was not only consistent with the *Amann* holding, but a "reasonable and natural development of the holding."[38]

Four years after the *Chrisafogeoris* case, the Illinois Supreme Court addressed yet another novel issue in the recognition of prebirth negligence. In *Renslow v. Mennonite Hospital,*[39] the court not only eliminated the viability requirement, but expanded liability to the preconception phase. In *Renslow*, the hospital and physician negligently transfused a thirteen year old girl with Rh positive blood. The girl, who had Rh negative blood, was sensitized by the transfusions, but only learned of it as an adult and after she became pregnant. Her infant was born with permanent brain and central nervous system damage as a result of the sensitization.[40]

In a closely divided opinion,[41] the court recognized the preconception negligence action for two reasons. First, it held that the defendant had a "contingent prospective duty" to the future born child.[42] Second, the court

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another jurisdiction which stated that "if no right of action is allowed there is a wrong inflicted for which there is no remedy." *Id.* (quoting Stidam v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959) and Kwaterski v. State Farm Mutual Auto. Ins. Co., 34 Wis. 2d 14, 20, 148 N.W.2d 107, 110 (1967)).

36. *Id.* at 374, 304 N.E.2d at 91.

37. *Id.* at 372, 304 N.E.2d at 91.

38. *Id.* at 374, 304 N.E.2d at 91. However, Justice Ryan's dissent strongly disagreed that the elimination of the live birth requirement was a "reasonable and natural development" of the *Amann* holding. The dissent contained the initial seeds of judicial restraint in the fetal rights movement and foreshadowed the *Stallman* opinion. Justice Ryan disagreed with the majority's interpretation of Illinois's Wrongful Death Statute and maintained that the fetus was not intended to be covered by the statute. *Id.* at 377, 304 N.E.2d at 92 (Ryan, J., dissenting). He also argued that by eliminating the live birth requirement and only requiring viability, the court had created a much less certain yardstick for measuring the validity of a claim. Live birth was a precise and observable occurrence, the Justice noted, while viability was "uncertain, indefinite and depends upon several factors other than the length of pregnancy." *Id.* at 376, 304 N.E.2d at 92. Additionally, Justice Ryan predicted that viability would soon be discarded as a measurement of the validity of a claim. In fact, this occurred four years later in *Renslow*. Justice Ryan objected to the expansion of "fetal rights," noting that in areas other than criminal abortion, the law had been reluctant to endorse any theory that life begins before live birth or to accord legal rights to the unborn. *Id.* at 380, 304 N.E.2d at 94-95.

39. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). *Renslow* prompted many legal scholars to call for the imposition of maternal civil and criminal liability for prenatal injury.

40. *Id.* at 349-50, 367 N.E.2d at 1251.

41. Three justices joined in the plurality opinion, one justice wrote a concurring opinion and three justices joined in the dissent.

42. *Id.* at 355-59, 367 N.E.2d at 1254-55.

reasoned that because routine blood typing had been an established practice for fifteen years, and it had been recognized that an Rh positive fetus of an Rh negative mother who was previously sensitized was at "high risk," the injury to the child was foreseeable.[43]

The court discussed duty and foreseeability at length, and emphasized that they were not identical in scope. Specifically, the court stated that although foreseeability aids a court in determining negligence, the duty question was one of law to be determined by the judge.[44] In finding "a contingent prospective duty," the majority stressed that "duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which leave the law to say that the particular plaintiff is entitled to protection."[45]

The court concluded that there was a right to be born free from prenatal injury foreseeably caused by a breach of duty to the child's mother.[46] In countering the defendant's assertion that recognizing such a claim would lead to perpetual liability, the court expressed confidence that the judiciary would "effectively exercise its traditional role of drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not."[47] In this case, however, the majority maintained that "logic and sound policy" required finding a legal duty.[48]

Justice Ryan wrote a strong dissent criticizing the court's judicial activism as a reflection of an increasing tendency to expand the traditional limits of tort liability with little regard for the resulting social consequences.[49] Specifically, Justice Ryan criticized the majority for basing its opinion on foreseeability and causation alone, and instead suggested that Prosser's approach, wherein duty was largely shaped by judicial determinations of the community's mores,[50] should be adopted. Additionally, Justice Ryan disagreed with the court's reasoning that their conclusion was appropriately

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43. *Id.* at 353-54, 367 N.E.2d at 1253.

44. *Id.* at 367-69, 367 N.E.2d at 1260 (Dooley, J., concurring).

45. *Id.* at 356, 367 N.E.2d at 1254 (quoting W. PROSSER, LAW OF TORTS § 53, at 325-26 (4th ed. 1971)).

46. *Id.* at 357, 367 N.E.2d at 1255.

47. *Id.* at 358, 367 N.E.2d at 1255. This quote later provided support for the *Stallman* court's decision to draw the line on perpetual liability.

48. *Id.* at 359, 367 N.E.2d at 1255.

49. *Id.* at 378, 367 N.E.2d at 1265 (Ryan, J., dissenting). Again, Justice Ryan's dissent foreshadowed the *Stallman v. Youngquist* decision.

50. *Id.* at 375, 367 N.E.2d at 1263. *See also* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953) (the court will decide whether there is a duty based on the mores of the community). Ryan also noted that the public was openly seeking limits to the expansion of tort liability through legislative measures, modification of judicially created law or the adoption of a no fault system of compensation. Nevertheless, Justice Ryan believed the court ignored this public outcry. 67 Ill. 2d at 379, 367 N.E.2d at 1266.

based on "logic" and "policy." He stressed the notion that "the life of the law has not been logic, it has been experience."[51]

Furthermore, Justice Ryan believed that this was the case for the court to establish limits of liability "short of the freakish and the fantastic."[52] He expressed doubts about the majority's conclusion that a future court would prevent far-reaching liability by drawing the line on the appropriate case. Instead, he believed that a future court, armed with the decision, could simply take one more "logical" step down the slippery slope to absolute liability.[53]

3. *Common Law Recognition of a Prenatal Negligence Cause of Action Against the Mother*

Renslow was the last Illinois Supreme Court case to address a prenatal or preconception negligence issue until *Stallman v. Youngquist*. In the ten year interim, one national case allowed a fetus to assert a cause of action against its mother.[54] Further, during this interim there were additional cases which sought to extend fetal rights protection in other circumstances.[55]

Grodin v. Grodin,[56] a Michigan appellate court decision, was the case to impose civil liability on a mother for her actions during pregnancy. In *Grodin*, the child, and the child's father as plaintiff and next friend, filed suit against the mother for negligently taking tetracycline while pregnant. The suit charged that the mother's negligence resulted in the child developing teeth that were permanently discolored.[57] The trial court granted summary judgment for the defendant based on an exception to the general abrogation of the parent child tort immunity doctrine.[58]

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51. *Id.* at 376, 367 N.E.2d at 1264 (quoting O. HOLMES, THE COMMON LAW 1 (1923)).

52. *Id.* at 372, 367 N.E.2d at 1264. Justice Ryan believed the decision abrogated the unquestionable rule of law that "negligence in the air, so to speak, will not do." *Id.* (quoting F. POLLOCK, TORTS 361 (14th ed. 1939)). He maintained that a duty of care owed to an entity not in existence would be the classic illustration of "negligence in the air." *Id.*

53. *Id.* at 377, 367 N.E.2d at 1265.

54. *See infra* notes 56-61 and accompanying text.

55. Fetal protection has been afforded in cases where a woman's prenatal conduct was used as the basis for abuse and neglect proceedings. *See, e.g., In re* Baby X, 97 Mich. App. 111, 293 N.W.2d 736 (1980); *In re* Smith, 128 Misc. 2d 976, 492 N.Y.S.2d 331 (N.Y. Fam. Ct. 1985). In other cases, the woman's prenatal conduct formed the basis for criminal charges related to the fetus's death. *See, e.g.*, Reyes v. California, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1976).

56. 102 Mich. App. 396, 301 N.W.2d 869 (1980).

57. *Id* . at 398, 301 N.W.2d at 869.

58. *Id.* The parental tort immunity doctrine is an American common law doctrine originating in the late 1800s. *See* Beal, *supra* note 2, at 333-57 (in-depth discussion of the historical development of the doctrine and its current modern day status).

The doctrine of parental immunity prevents a child from suing his or her parent for personal injuries arising from a negligent or intentional act. *See* W. PROSSER, LAW OF TORTS § 122, at 865 (4th ed. 1971). The doctrine is premised on the belief that if a child were allowed to sue a parent for a personal tort it would disrupt family harmony, encourage collusion and fraud, and impair parental authority and discipline. Stallman v. Youngquist, 152 Ill. App. 3d 683, 504 N.E.2d 920 (1st Dist. 1987), *rev'd*, 125 Ill. 2d 267, 531 N.E.2d 355 (1988).

The appellate court reversed and concluded that the woman was civilly liable. This conclusion was based on the Michigan Supreme Court decision in *Womack v. Buckhorn*,[59] which allowed a common law action for negligently inflicted prenatal injury. The court noted that the *Womack* decision did not limit who could be liable for prenatal negligence, but only specified that a child had an action for prenatal negligence for the wrongful conduct of others.[60] Therefore, the appellate court concluded, without further analysis, that the litigating child's mother would bear the same liability for injurious negligent conduct as would a third person.[61]

4. *Maternal Criminal Liability Cases Analogized to Civil Liability*

The common law rule regarding the imposition of maternal civil liability is limited to the *Grodin* case, an analysis rejected by the Illinois Supreme Court. Therefore, an examination of criminal liability cases may provide a useful analogy for considering the imposition of maternal civil liability.[62] Several cases have attempted to impose criminal liability on the mother for her prenatal acts,[63] and some states impose criminal charges for drug use on women who subsequently deliver infants with symptoms suggestive of exposure to drug ingestion.[64] In both instances, the infant's condition at birth is used as evidence of the mother's criminal conduct during the prenatal period.[65]

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59. 384 Mich. 718, 187 N.W.2d 218 (1971).

60. *Grodin*, 102 Mich. App. at 400, 301 N.W.2d at 870.

61. *Id.* The *Grodin* court's opinion has been assailed by some as lacking analysis. *See* Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1987) (court found *Grodin* unpersuasive because the *Grodin* court failed to address any of the profound implications of its holding.); Note, *A Maternal Duty?*, *supra* note 2, at 536 (asserting that the *Grodin* opinion is completely lacking in analysis).

62. Many commentators who support imposing maternal liability suggest that both civil and criminal liability be imposed. This suggestion implies that the legal basis for imposing civil liability is the same as for imposing criminal liability. If this is the logic, it is interesting to note that to date no woman has been held criminally liable for her prenatal acts and resulting effects on her fetus. *See* sources cited *supra* note 2.

63. *See, e.g.*, Reyes v. Superior Court, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977); People v. Stewart, No. M508197, slip op. (San Diego Mun. Ct. Feb. 26, 1987).

64. *See, e.g.*, Plan Would Jail "Fetal Abusers," NAT'L L.J., Nov. 21, 1988, at 3, col. 1. (county using newborns' urine tests to prosecute mothers for illegal drug abuse); Sherman, *Keeping Baby Safe From Mom*, NAT'L L.J., Oct. 3, 1988, at 1, col. 1. (article discusses national trend to impose criminal liability on women who are known drug abusers).

65. The use of a woman's prenatal conduct for the imposition of liability and its infringement of a woman's rights formed the basis for the Illinois Supreme Court's rejection of imposing civil maternal liability in *Stallman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d 355 (1988). Those who oppose the imposition of criminal liability for a woman's prenatal acts maintain that such actions will turn the prenatal care and delivery system to a police force and will not result in better fetal health. *See* Sherman, *supra* note 64, at 24, col. 4. Other opponents of criminal maternal liability argue that state intervention in pregnancy poses serious problems of discrimination, invasion of privacy and lack of due process. *See* Plan Would Jail "Fetal Abusers," *supra* note 64, at 24, col. 3.

To date, two California cases have unsuccessfully sought to impose criminal sanctions on a woman for her prenatal conduct. In *Reyes v. California*,[66] the defendant was a heroin addict who failed to obtain prenatal care and continued her heroin abuse throughout her pregnancy. She gave birth to twin boys who exhibited symptoms of heroin withdrawal shortly after their birth. The woman was charged with two counts of felony child endangerment.[67] The *Reyes* court concluded that the word "child" was not intended to refer to an unborn child and therefore defendant's actions did not constitute felonious child endangerment.[68]

Another unsuccessful attempt to impose criminal liability for a woman's prenatal acts occurred eleven years later in *People v. Stewart*.[69] The facts of the *Stewart* case suggest how ignorance, misunderstanding, and inadequate prenatal care can lead to disastrous results.[70] Defendant's husband worked only sporadically, while Stewart herself had only an eleventh grade education. Additionally, the couple and their two children moved frequently. As a result, Stewart obtained very little prenatal care during her third pregnancy. In her eighth month of pregnancy, Stewart experienced vaginal bleeding and pain. She was diagnosed as having placenta previa, a condition with potentially fatal implications for both mother and child.[71]

Stewart was hospitalized overnight and was discharged with instructions to stay off her feet, avoid sexual intercourse, and to take medicine to stop

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66. 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977).

67. *Id.* at 216, 141 Cal. Rptr. at 913. Reyes was charged under § 237a(1) of the California Penal Code which made it a felony for "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death . . . having the care or custody of any child, . . . wilfully causes or permits such child to be placed in such situation that its person or health is endangered." CAL. PENAL CODE § 273a(1) (West Supp. 1988).

68. 75 Cal. App. 3d at 219, 141 Cal. Rptr. at 914-15. The *Reyes* court noted that when the legislature intended to include fetuses within a penal statute it had done so expressly. Since there was no express inclusion of fetuses within the statute, the court would not interpret the statute to apply to the unborn. *Id.* at 219, 141 Cal. Rptr. at 915.

69. People v. Stewart, No. M508197, slip op. (San Diego Mun. Ct. Feb. 26, 1987).

70. The facts of the *Stewart* case are discussed more fully in Note, *The Pamela Rae Stewart Case, supra* note 2, at 227. The author suggests that Ms. Stewart did not understand the severity of her condition and that this caused her lack of compliance. Stewart maintained that she knew she needed a caesarean section, but believed it was because the baby was in a breech position. She claimed that no one at the hospital told her that her condition was more serious. *Id.* at 228. This misunderstanding, and a lack of regular prenatal care, contributed to the unfortunate results.

Women with less than a high school education are not as likely to be aware of the potential prenatal complications that can arise. *See* Oxford, Schinfeld, Elkins & Ryan, *Deterrents to Early Prenatal Care: A Comparison of Women Who Initiated Prenatal Care During the First and Third Trimesters of Pregnancy*, 78 TENN. MED. A. 691, 692-93. Additionally, limited prenatal care is likely to result in less communication between a physician and a pregnant woman, and increase the potential for complications. This fact, legal theorists argue, demonstrates that the imposition of criminal liability discriminates against the poor. *See* Sherman, *supra* note 64, at 24, col.3.

71. *See* Note, *The Pamela Rae Stewart Case, supra* note 2, at 229.

the bleeding. Twelve days later, she had intercourse with her husband and admitted to "taking a puff of a marijuana cigarette." She gave birth by emergency cesarean section to a baby boy who was diagnosed as brain dead at birth due to lack of oxygen.[72]

Nine months later, Stewart was charged with contributing to the death of her child.[73] The applicable statute made it a misdemeanor for a parent to fail to provide necessary medical attention and other remedial care to a minor child. However, the presiding judge concluded the legislative history and intent of the statute suggested it was enacted to encourage parents to provide their children with financial support. Therefore, the judge concluded the statute was not intended to apply to the case at hand and declined to impose a duty upon a pregnant woman.[74]

Thus, to date no state has successfully imposed criminal liability on a woman for her prenatal acts, and only one state appellate court has imposed civil liability on a woman for her prenatal acts. Additionally, there is no case law that establishes a precedent for imposing maternal liability except for *Grodin v. Grodin*.[75] Nonetheless, legal scholars have continued to argue for the imposition of maternal civil and criminal liability.[76] Since the imposition of maternal liability is not established in the common law, fetal rights proponents have utilized cases involving prenatal negligence of third parties, cases involving women's rights to privacy and cases involving the state's interest in fetal health and well-being to support their position.[77] Therefore, a background discussion on the imposition of civil maternal liability must include case law highlighting the underlying competing rights and interests involved in imposing maternal liability.

B. Competing Rights and Interests

1. The Fetus's Right to be Born Whole

The expansion of the fetus's legal status has led fetal rights proponents to assert that a woman should be held civilly and criminally liable for her

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72. *Id.*

73. Stewart was charged with contributing to the death of her son under § 270 of the California Penal Code, which provides:

> If a parent of a minor child wilfully omits, without lawful excuse, to furnish necessary clothing food, shelter or medical attendance or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

CAL. PENAL CODE § 270 (West Supp. 1988).

74. *See* Note, *The Pamela Rae Stewart Case, supra* note 2, at 230. After the *Stewart* case, California Senator Royce introduced an amendment to the child endangerment statute which included the words "or fetus" after each instance of "child" within the statute. He was ultimately forced by his opponents to withdraw the bill. *Id.* at 231 n.34.

75. 102 Mich. App. 396, 301 N.W.2d 869 (1980).

76. *See* sources cited *supra* note 2.

77. *See infra* notes 78-142 and accompanying text.

prenatal acts.[78] The aforesaid expansion of fetal rights was fostered by the belief that a fetus has a right to begin life with a sound mind and body.[79] This right was first enunciated in *Smith v. Brennan*,[80] and has led to the erosion of the *Bonbrest* criteria of live birth and viability.[81] This erosion has resulted in increased liability for prenatal negligence.[82] Courts argued that the criteria of viability or a live birth frustrated the fetus's right to be born whole, and eventually these factors gave way to the "logic and justice" that such a right demands. Commentators asserted that the fetus's right to a sound mind and body, coupled with the trend toward abrogation of the parent-child tort immunity doctrine, laid the groundwork for the imposition of both civil and criminal maternal liability.[83] However, some authors contend that the *Smith* holding has been misconstrued and that there is no common law or constitutional right to be born whole.[84]

The belief that the fetus has a right to be born whole has encouraged prenatal child abuse and neglect proceedings, thus providing further evidence of the legal trend toward expanding fetal rights. This trend is noteworthy because it reflects the courts' willingness to scrutinize a woman's prenatal conduct. In *In re Baby X*,[85] a Michigan probate court concluded that evidence of neonatal heroin withdrawal was sufficient evidence of neglect to justify taking temporary custody of the newborn. The court concluded that since a child has a right to begin life with a sound mind and body, it was in the best interest of the child to examine all prenatal conduct bearing on that right.[86] Therefore, the court held that evidence of prenatal drug abuse was at least sufficient to support the state in taking temporary custody of a child.[87]

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78. *See* sources cited *supra* note 2.

79. Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

80. 31 N.J. 353, 157 A.2d 497 (1960).

81. *Id.* at 364-65, 155 A.2d at 503.

82. *See supra* notes 21-53 and accompanying text.

83. *See* Note, *Parental Liability*, *supra* note 2, at 90 (for the proposition that the "parents' rights to autonomy should be limited when they conflict with the right of the child to be born whole."). Another commentator favoring maternal liability reached the conclusion that there was no legal obstacle to giving viable fetuses legal protection fully equivalent to that given the newborn. Furthermore, this commentator urged that the woman's and the fetus's rights be weighed equally to resolve the conflict. *See* King, *The Juridical Status of the Fetus*, 77 MICH. L. REV. 1647 (1981). *But see* Parness, *Values & Legal Personhood: A Proposal for Logical Protection of the Unborn*, 83 W. VA. L. REV. 487, 501 (1981) (discussion of the consequences of equating the born with the unborn and its impact on human freedom and the overall quality of life).

84. *See* Nelson, Buggy & Weil, *Forced Medical Treatment of Pregnant Women: "Compelling Each To Live as Seems Good to the Rest,"* 37 HASTINGS L.J. 703, 735 (1986) [hereinafter Nelson] (concluding that Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960), only holds that a live born child has a right to recover damages for a prenatal injury and to claim that the *Smith* holding stands for the proposition that everyone holds a legal duty to a fetus is to "stretch the holding beyond recognition.").

85. 97 Mich. App. 111, 293 N.W.2d 736 (1980).

86. *Id.* at 115, 293 N.W.2d at 739.

87. *Id.* at 120-21, 293 N.W.2d at 741.

Additionally, in *In re Smith*,[88] a New York family court held that an unborn child could be considered a person under the Family Court Act. In *Smith*, the state initiated child neglect proceedings on behalf of a newborn whose record indicated the child might have "fetal alcohol syndrome." The court noted that at least one prior New York decision held that an excessive use of drugs prior to birth would support a finding that a child was a "neglected child."[89] While the court noted that the evidence was inadequate to support a finding of fetal alcohol syndrome, the court nonetheless concluded that the evidence of parental prenatal alcohol abuse was sufficient to establish an "imminent danger" of impairment to the unborn child.[90]

The above neglect cases conclude that a fetus has a right to a sound mind and body, and therefore a court is justified in scrutinizing all prenatal conduct bearing on that right. However, other courts have held that prenatal acts cannot be used for determining child neglect, and that fetuses are not protected under state child abuse and neglect statutes.

In *In re Steven S.*,[91] a California court attempted to have a fetus declared a dependent in order to confine a woman in a psychiatric institution.[92] A juvenile court interpreted the state dependent child provisions as protecting the fetus and ordered that the mother be detained.[93] The appellate court reversed, reasoning that courts had not interpreted California statutes to include fetuses within the meaning of the word person unless the legislature had expressly provided for it.[94] Similarly, a Michigan Court of Appeals held that juvenile protection statutes did not apply to the unborn. In *In re Dittrick*,[95] a woman became pregnant while child abuse charges against her were pending.[96] The appellate court concluded that while it was possible that the statutory use of the word child included fetuses, it was not the legislature's intent to do so in this particular statute.[97] Thus, although fetal rights proponents argue that the fetus's right "to be born whole" renders child abuse and neglect statutes applicable, this assertion is not unanimously supported by the courts.[98] The proponents for imposing maternal liability also suggest that such activities as eating, smoking, drinking alcohol, using medication, engaging in sexual intercourse, and working may pose a danger to the fetus and thus infringe on its right to be born whole.[99] In light of this, these proponents maintain that the state has a legitimate interest in

88. 128 Misc. 2d 976, 492 N.Y.S.2d 331 (N.Y. Fam. Ct. 1985).
89. *Id.*
90. *Id.* at 979, 492 N.Y.S.2d at 334.
91. 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981).
92. *Id.*
93. *Id.* at 27, 178 Cal. Rptr. at 526.
94. *Id.* at 29, 178 Cal. Rptr. at 528.
95. 80 Mich. App. 219, 263 N.W.2d 37 (1977).
96. *Id.* at 221, 263 N.W.2d at 38.
97. *Id.* at 223, 263 N.W.2d at 39.
98. *See supra* notes 92-96 and accompanying text.
99. *See* Note, *Parental Liability, supra* note 2, at 73-75.

scrutinizing all of a woman's prenatal conduct and in imposing civil and criminal liability to protect fetal rights. However, there are numerous constitutional issues involved in regulating a woman's prenatal conduct and in using that conduct to impose civil or criminal liability.

2. The Woman's Constitutional Rights

Any attempt to regulate prenatal conduct necessarily involves consideration of a woman's rights to personal privacy, bodily integrity,[100] and procreative autonomy, as well as equal protection and procedural due process rights.[101] The notion of a general constitutional right to privacy was articulated by Justice Brandeis in the late nineteenth and early twentieth century. Justice Brandeis advocated a broad reading of the fourth amendment to prevent the government from intruding into an individual's privacy.[102] He articulated the individual's privacy as "the right to be left alone - the most comprehensive of rights."[103] The Court also broadly constructed the due process clause of the fourteenth amendment to uphold freedom of choice in child rearing decisions.[104] In *Meyer v. Nebraska*,[105] the Supreme Court held that parents had a constitutional right to the custody and care of their children. Furthermore, in *Pierce v. Society of Sisters*,[106] the Court held that the state must not unreasonably interfere with parents' liberty to rear and nurture their offspring. With these decisions, the Court expanded the general right of privacy articulated by Justice Brandeis to specific constitutional guarantees.

These decisions laid the foundation for the Court to find a "right to privacy," based on "penumbras" which emanated from the Bill of Rights. In *Griswold v. Connecticut*,[107] the Supreme Court struck down a statute which forbade the use of contraceptives by a married couple. The majority

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100. For cases upholding the right to bodily integrity and autonomy, see Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891); Mohr v. Williams, 95 Minn. 261, 268, 104 N.W. 12, 14 (1905), *overruled on other grounds*, Genzel v. Halvorson, 248 Minn. 527, 80 N.W.2d 854 (1957). For more modern cases upholding the Constitutional right to privacy and bodily integrity, see Winston v. Lee, 470 U.S. 753 (1985); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

101. For a discussion of the various constitutional and common law rights implicated, see Nelson, *supra* note 84, at 745-62; Note, *The Fetal Rights Controversy: A Resurfacing of Sex Discrimination in the Guise of Fetal Protection*, 57 UMKC L. REV. 261 (1989); Note, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051 (1981) [hereinafter Note, *Constitutional Limitations*]; Note, *The Creation of Fetal Rights Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L. REV. 599, 614-24 (1986).

102. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

103. *Id.*

104. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

105. 262 U.S. 390 (1923).

106. 268 U.S. 510 (1925).

107. 381 U.S. 479 (1965).

opinion concluded that the Bill of Rights protected privacy interests and created a "zone of privacy."[108] The Court held that the use of contraceptives among married couples fell within this constitutionally protected zone of privacy.[109] Thus, in *Griswold*, historical values of privacy were articulated as constitutional guarantees.[110] This initial guarantee of a married couple's right to make choices regarding procreation led to additional protection of privacy rights. Specifically, the Court subsequently recognized general privacy rights to procreation,[111] contraception,[112] and a woman's right to an abortion.[113] As the Court stated in *Carey v. Population Services International*,[114] "[t]he teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state."[115] Additionally, the Court has concluded that in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education . . . there are limitations on the States' power to substantively regulate conduct."[116]

The cases recognizing constitutional rights to privacy and autonomy stress that whenever the government seeks to limit these fundamental rights, it must establish a compelling state interest and it must demonstrate that the means are necessary to achieve a permissible state policy.[117] Furthermore, the state must pursue means which are narrowly tailored.[118]

The recent decision in *Webster v. Reproductive Health Services*,[119] however, suggests that a woman's constitutional right to abortion may be threatened. The Court indicated a willingness to overturn *Roe v. Wade*[120] and to adopt a new standard for abortion decisions. Instead of the strict

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108. *Id.* at 485.

109. *Id.* at 485-86.

110. *Griswold* has been interpreted as articulating two distinct constitutional principles of privacy. One principle is that an individual should be free from government intrusion into home or family affairs. The second principle is that one has a right to autonomous decision making regarding procreation. *See* Note, *Constitutional Limitations, supra* note 101, at 1056-61.

111. Roe v. Wade, 410 U.S. 113 (1973).

112. Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute prohibiting distribution of contraceptives to unmarried persons invalidated).

113. Roe v. Wade, 410 U.S. 113 (1973).

114. 431 U.S. 678, 687 (1976).

115. *Id.*

116. Whalen v. Roe, 429 U.S. 589, 600 n.26 (1977).

117. The court must apply strict scrutiny to any laws infringing on fundamental rights or involving a suspect class. *See* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 16 (1973) (state has a heavy burden of justification and the means must be precisely and narrowly tailored); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (even though the purpose is legitimate, the means must not "broadly stifle" fundamental liberties when the end can be more narrowly reached); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (the power to regulate must not unduly infringe on protected freedoms).

118. *San Antonio Indep. School Dist.*, 411 U.S. at 16.

119. 109 S. Ct. 3040 (1989).

120. 410 U.S. 113 (1973).

scrutiny approach, Chief Justice Rehnquist suggested that the Missouri testing requirement is "reasonably designed to ensure that abortions are not performed where the fetus is viable—an end which all concede is legitimate—and that is sufficient to sustain its constitutionality."[121] This quote was assailed by the dissent as a "newly minted standard . . . circular and totally meaningless" and a novel test which "appears to be nothing more than a dressed-up version of rational-basis review."[122] Although there is concern for the potential contraction of women's privacy rights in the abortion context, the current law still upholds fundamental rights to privacy and applies the strict scrutiny test to any state interference with those privacy rights. Hence, any attempts to impose civil or criminal maternal liability must be narrowly tailored.[123]

Due process issues are also raised by any government attempt to impose civil or criminal liability for a woman's prenatal acts. The due process clause of the fourteenth amendment applies to any government action that impairs an individual's life, liberty or property.[124] When the government's action results in such an impairment, the government must assure adequate hearing and process.[125] An attempt to take custody of a pregnant woman to protect a fetus involves such an impairment, and presents the potential for violation of a woman's due process rights.

In sum, several constitutional rights are involved in any attempt to regulate prenatal conduct and impose maternal liability. While maternal rights may conflict with fetal rights, there is no established rule that the state may intervene and circumscribe these rights, especially if the fetus is nonviable.[126]

3. State Interests

Any state action infringing on an individual's constitutional rights must be based on a permissible state interest. While the majority of commentators

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121. 109 S. Ct. at 3058.

122. *Id.* at 5040.

123. The imposition of civil or criminal liability for a mother's prenatal negligence also raises an equal protection issue. Specifically, because only a woman can become pregnant, only a woman's life would be effected by excessive intrusion. Such equal protection issues have already surfaced. For example, there are indications that pregnant women who are known or suspected drug abusers have been more severely punished and incarcerated in jail for their crimes. *See* Sherman, *supra* note 64, at 1, col. 1. The judges imposing the jail sentences have openly admitted that if the women were not pregnant they might not have been incarcerated for the crime. *Id.*

124. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 13.2, at 453 (3d. ed. 1986).

125. *Id.* The use of infants' urinalysis tests to enable the state to take custody of newborns in New York Nassau county has raised due process concerns. An attorney representing the mothers who have lost custody of their infants asserts that the state has violated the women's rights to privacy and due process by removing their newborns based on scant evidence and without adequate opportunity to dispute the accusations. *See* Sherman, *supra* note 64, at 24, col. 4.

126. For a discussion of why the state may not elevate the rights of the fetus over the mother, see Annas, *Forced Caesareans: The Most Unkindest Cut of All,* 12 HASTINGS CENTER REP., 16 (1982); Gallagher, *supra* note 2, at 9; Nelson, *supra* note 84, at 703 (1986).

find the state has legitimate interests in the protection of the fetus, there is no consensus on what these interests enable the state to do.[127]

Roe v. Wade provided the foundation for determining whether the state has a compelling interest to infringe on a woman's prenatal acts. Those who argue that there is a legitimate state interest in protecting the fetus rely on the balance the *Roe* Court articulated between the woman's right to an abortion against the state interests of safeguarding maternal health, maintaining medical standards, and protecting potential life.[128] The *Roe* Court held that when the fetus reaches viability, the state has a compelling interest in protecting the potentiality of life.[129] Furthermore, the proponents maintain that this state interest in the fetus is not just specific to regulating abortion, but is instead a general interest in the potential well-being of the fetus.[130]

Furthermore, legal scholars suggest that the state's interest in protecting the fetus is consistent with the state's interest in the preservation of life and the state's interest in youth. The interest in society's youth enables the state to intervene to protect children's interests when their parents fail to do so.[131] This intervention is authorized by the state's police powers and its *parens patriae* authority. This power allows the state a limited ability to protect or promote the welfare of those who lack the capacity to act in their own interests.[132]

The *Roe* decision, however, does not provide the state with an absolute interest in the protection of the fetus. Instead, the decision granted only an interest limited by the mother's right to privacy and her own well-being.[133]

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127. Some authors suggest the state should impose only civil liability, while others prefer only the imposition of criminal liability. Some propose both.*See* sources cited *supra* note 2. Furthermore, other authors recognize a state interest, but submit that the only appropriate state action is a balancing test. *See* Note, *Constitutional Limitations, supra* note 101, at 1067. However, some commentators contend there is no legal basis for concluding the state has a legitimate overriding interest in the fetus that may circumscribe the woman's constitutional rights. *See* Gallagher, *supra* note 2, at 749-62; Nelson, *supra* note 84, at 703.

128. *See* Myers, *Abuse and Neglect of the Unborn,* 23 DUQ. L. REV. 1, 17-18 (1984) ("*Roe* makes clear that the state has substantial authority to protect fetal life"); Shaw, *Conditional Prospective Rights of a Fetus,* 5 J. LEGAL MED. 63 (1984) (asserts that the inference of *Roe* is that once a woman decides to carry a pregnancy to term not only is there a compelling state interest, but that the woman incurs liability for any negligent harm inflicted upon the fetus).

129. 410 U.S. 113, 162-63 (1973).

130. *See* Myers, *supra* note 128, at 18-24; Shaw, *supra* note 128, at 63. Commentators supporting a state interest often rely on cases requiring pregnant women to submit to blood transfusions for the benefit of the fetus, and the involuntary cesarean section cases as further support for establishing a state interest in the preservation of fetal life. However, other commentators believe that relying on the involuntary blood transfusion cases as basis for allowing state intervention in the pregnant woman's life is inappropriate. *See* Annas, *supra* note 126, at 17; Gallagher, *supra* note 2, at 26-27.

131. Myers, *supra* note 128, at 18-24.

132. *Id.*

133. *See* Nelson, *supra* note 84, at 757. The authors note that a pregnant woman who refuses medical treatment has a strong personal interest in her bodily integrity. This interest,

Some commentators, noting the courts' reluctance to authorize even minor involuntary bodily intrusions, conclude that there is no strong support for asserting that the state's interest in the fetus could allow forced medical treatment of pregnant women. Rather, they conclude that the state's interest in fetal life is not sufficient to overcome a woman's rights to privacy and bodily integrity. However, conclusions that the state interest in the fetus is strictly limited by the mother's rights to privacy and well-being conflict with case law allowing the state to intervene to protect the fetus.

One such case is *Jefferson v. Spalding County Hospital Authority.*[134] In *Jefferson,* the Georgia Supreme Court upheld a superior court order authorizing the county hospital to perform a cesarean upon the plaintiff in the event she arrived at the hospital for delivery.[135]

The plaintiff suffered from placenta previa, but would not submit to a cesarean because of religious beliefs. In the juvenile proceeding, the court concluded that the fetus was entitled to the protection of the Juvenile Court of Georgia and granted the state temporary custody of the fetus. The mother was ordered to submit to an ultrasound exam, and if this exam indicated that the placenta continued to block the birth canal, the mother was to submit to surgery.[136] The Georgia Supreme Court concluded that the intrusion into the life of the mother was outweighed by the state's compelling interest in protecting the fetus.[137]

Similarly, the District of Columbia Court of Appeals upheld a lower court order to perform an involuntary cesarean section on a twenty-six week pregnant, terminally ill woman.[138] However, while this court order was upheld, and the woman was forced to have surgery, the order was later vacated. In the vacating opinion, the appellate court concluded that when a fetus becomes viable, the state has a compelling interest in protecting the "potentiality of human life."[139]

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the authors maintain, is supported by both common law and the Constitution. *See also* Annas, *supra* note 126, at 16. Professor Annas agrees that *Roe* establishes a compelling state interest in preserving the life of a viable fetus, but maintains that the state does not have such an interest if the life or health of the mother is endangered. *Id.* at 17. Annas concludes that *Roe* gives neither judges nor physicians the right to favor the life or health of the fetus over the mother and that what constitutes the "health" of the mother is a broad concept. *Id.*

134. 247 Ga. 86, 274 S.E.2d 457 (1981).

135. *Id.* at 89, 274 S.E.2d at 460.

136. *Id.* at 88-89, 274 S.E.2d at 460.

137. *Id.* at 89, 274 S.E.2d at 460. The court did not address the issue of whether an unborn child was a person for purposes of the Juvenile Protection Act. However, a concurring opinion expressed the belief that the legislature intended the juvenile courts to exercise jurisdiction only when a child had seen the "light of day." *Id.* at 92, 274 S.E.2d at 461-62 (Smith, J., concurring). Justice Smith concluded that he was aware of no "child deprivation" proceeding wherein the "child was unborn." *Id.* at 92, 274 S.E.2d at 462.

138. In re A.C., 533 A.2d 611, 56 U.S.L.W. 299 (D.C. App. 1987), *vacated,* 539 A.2d 203 (D.C. App. 1988).

139. *Id.* at 614.

Court orders imposing surgery for the benefit of the fetus, however, have not always been upheld. In *Taft v. Taft*,[140] the Supreme Judicial Court of Massachusetts refused to uphold an order which required a woman to submit to surgery to ensure that her pregnancy would go to term. The woman in *Taft* was four months pregnant and refused to submit to the surgical procedure based on her newly formed religious convictions. The supreme court noted that the lower court judge failed to discuss the significance of the woman's constitutional right to privacy.[141] The court noted that the record did not support the need for the operation and did not demonstrate circumstances so compelling as to justify curtailing the woman's constitutional rights.[142]

C. *Summary of Background*

What circumstances, if any, justify a curtailing of a woman's constitutional rights is still largely an unanswered question. The consideration of whether maternal civil liability should be imposed is complicated by many unknown and conflicting variables. First, there is the virtual lack of precedent for imposing civil maternal liability in Illinois. Furthermore, while the state of Illinois has a significant body of case law dealing with prenatal negligence, the cases are all limited to third party liability.

Thus, while there is no factually consistent precedent, there is case law addressing fetal rights, women's constitutional rights, and what constitutes a compelling state interest. However, with the exception of the Supreme Court decisions delineating women's constitutional rights, the case law is inconsistent in its assessment of fetal rights and compelling state interests. This uncertainty is reflected in the Illinois Supreme Court's conclusion in *Stallman v. Youngquist.*

II. THE *Stallman v. Youngquist* DECISION

In *Stallman v. Youngquist*,[143] a mother was sued for injuries her child sustained in utero during a motor vehicle accident allegedly caused by her negligence. The case was before the Circuit Court of Cook County and the appellate court twice.

In *Stallman v. Youngquist I*,[144] the main issue on appeal was whether plaintiff father's complaint asserting the mother's prenatal negligence stated a cause of action. The appellate court held that a valid cause of action existed.[145] The court recognized the existence of the parent-child tort immunity doctrine, but emphasized the trend of finding exceptions to the

140. 388 Mass. 331, 446 N.E.2d 395 (1983).
141. *Id.* at 333, 446 N.E.2d at 396.
142. *Id.* at 335, 446 N.E.2d at 397.
143. 125 Ill. 2d 267, 531 N.E.2d 355 (1988).
144. 129 Ill. App. 3d 862, 473 N.E.2d 400 (1st Dist. 1984).
145. *Id.* at 864, 473 N.E.2d at 404.

doctrine.[146] In particular, the court noted that in *Schenk v. Schenk*,[147] a child was allowed to sue her father for his negligence in an automobile accident. In recognizing this cause of action, the *Schenk* court reasoned that the accident occurred outside the context of the family relationship and was not directly connected with family purposes and objectives.[148] Relying on the *Schenk* decision, the appellate court concluded that if the plaintiff could establish that the defendant's acts occurred outside the family relationship, then the parent-child immunity doctrine would not apply.[149] Therefore, the court concluded that the applicability of the immunity rule was a question of fact and could not be decided on a motion to dismiss.[150]

On remand, the defendant filed a motion for summary judgment. The trial court found that the immunity doctrine did apply and granted the motion for summary judgement. Plaintiff appealed, and, in *Stallman v. Youngquist II*,[151] the appellate court re-evaluated the parent-child immunity doctrine and concluded that the three major justifications for parental immunity did not withstand analysis.[152] The three justifications were the promotion of family harmony, the prevention of collusion, and upholding of parental authority.[153] The court concluded that these justifications for parental immunity did not "withstand analysis in light of modern conditions."[154] Therefore, the parental tort immunity doctrine was abrogated and the plaintiff was held to have a valid cause of action.[155]

The defendant appealed to the Illinois Supreme Court. The court concluded that there was a preliminary issue to be addressed before reaching the parent-child tort immunity question. Specifically, the issue was whether a cause of action by, or on behalf of, a fetus, subsequently born alive, could be asserted against its mother for the unintentional infliction of prenatal injuries.[156] The court refused to recognize such a cause of action, thereby rendering any consideration of the parental immunity doctrine unnecessary.[157]

In deciding this case of first impression, the court reviewed tort liability for prenatal negligence by third persons.[158] The court stressed that all previous case law involved a third person as defendant instead of the mother of the plaintiff.[159] This was a crucial distinction for the court. The court

146. *Id.* at 862, 473 N.E.2d at 402.
147. 100 Ill. App. 2d 199, 241 N.E.2d 12 (4th Dist. 1968).
148. *Id.* at 203, 241 N.E.2d at 14.
149. *Stallman I*, 129 Ill. App. 3d at 864, 473 N.E.2d at 403.
150. *Id.* at 865, 473 N.E.2d at 403.
151. 152 Ill. App. 3d 683, 504 N.E.2d 920 (1st Dist. 1987).
152. *Id.* at 692, 504 N.E.2d at 925.
153. *Id.* at 692-93, 504 N.E.2d at 925.
154. *Id.* at 691, 504 N.E.2d at 925.
155. *Id.* at 694, 504 N.E.2d at 926.
156. Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1988).
157. 125 Ill. 2d at 267, 531 N.E.2d at 356.
158. *Id.* at 271-74, 531 N.E.2d at 356-60.
159. *Id.* at 274, 531 N.E.2d at 358.

assailed the *Grodin* court's lack of analysis in concluding that a mother would bear the same liability as a third party for negligent conduct which results in prenatal injury.[160] The court maintained that the *Grodin* court would "treat a pregnant woman as a stranger to her developing fetus."[161] Furthermore, the court concluded that the *Grodin* court articulated a "legal fiction" without addressing any of the profound implications such a concept would entail. For these reasons, the court found the *Grodin* opinion unpersuasive.[162]

Next, the *Stallman* court addressed the common law notion of a "legal right to begin life with a sound mind and body."[163] The court noted that this right emphasized that third party acts against pregnant women could result in compensable injury to a fetus. The Illinois Supreme Court agreed that a fetus should be allowed to recover against third parties.[164] However, the court concluded that a defendant mother was different than any other defendant in a prenatal action, and that this distinction necessitated a different result. Specifically, the court stated that, "it would be a legal fiction to treat the fetus as a separate legal person with rights hostile and assertable against its mother."[165]

The court conceded that if the fetus could assert a legal right to begin life with a sound mind and body against its mother, then the mother would have a legal duty to the fetus.[166] However, the court stressed that it was not the law of Illinois that a fetus had rights which were superior to those of its mother.[167]

The *Stallman* court noted that if it recognized such a duty, then any action which negatively effected fetal development would constitute a breach of this duty. The court reasoned this recognition would result in an unprecedented intrusion into the privacy and autonomy of pregnant women. Furthermore, the court stated that holding third party tortfeasors liable did not interfere with the defendant's right to control her life, but that holding a woman liable for her prenatal conduct invited state scrutiny into all her decisions.[168] Because the court refused to recognize that a fetus could assert a right to begin life with a sound mind and body against its mother,[169] the court concluded there could be no cognizable duty. Additionally, the court refused to recognize the fetus as a separate legal person from its mother.[170]

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160. *Id.* at 274-75, 531 N.E.2d at 358.
161. *Id.*
162. 125 Ill. 2d at 274-75, 531 N.E.2d at 358.
163. *Id.* at 275, 531 N.E.2d at 359. *See also supra* notes 78-99 and accompanying text.
164. *Id.* at 272, 531 N.E.2d at 357-58. *See also* Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Renslow v. Mennonite, 67 Ill. 2d 349, 367 N.E.2d 1250 (1977).
165. 125 Ill. 2d at 278, 531 N.E.2d at 360.
166. *Id.* at 276, 531 N.E.2d at 359.
167. *Id.*
168. *Id.*
169. *Id.* at 275-76, 531 N.E.2d at 359.
170. *Id.* at 276, 531 N.E.2d at 359.

The court recognized that early common law had erred in treating the fetus as if it was only a part of the woman's body. However, the court stressed it would not err in the opposite extreme by concluding that the fetus was "entirely separate from its mother."[171]

The *Stallman* court further explained why it should not recognize a maternal legal duty. Specifically, the court indicated that there were other factors besides foreseeability and causation that influenced the imposition of a legal duty.[172] The court noted that it was foreseeable that any acts or omissions by a pregnant woman could adversely effect fetal development.[173] However, the court relied on Prosser's conclusion that causation alone is an inadequate basis for imposing duty.[174] Therefore, even though the injury was foreseeable and the causation established, the court would not automatically impose a legal duty.

The *Stallman* opinion stressed that the determination of duty was a matter of law, and that in this determination "the judiciary will exercise its traditional role of drawing rationale distinctions, consonant with current perceptions of justice between harms which are compensable and those that are not."[175] Thus, because of its far-reaching implications, the court refused to recognize a common law maternal legal duty to a fetus. Instead, the court deferred to the legislature as the more appropriate forum. The court indicated that it in no way sought to minimize the public policy favoring healthy newborns. It simply concluded that before-the-fact education of all women and their families would be a more effective means of achieving fetal health than the imposition of after-the-fact civil liability.[176]

III. ANALYSIS

The *Stallman* court, in reaching its decision, considered various competing public policies. Among these policies were the preservation of a woman's right to privacy and autonomy and the state's interest in the life, health and welfare of the fetus. The result was an artfully vague opinion in which the court held that a woman would not be civilly liable for her prenatal conduct.

The *Stallman* decision provides hope both for women's rights and for limiting tort liability. However, it is not a broad opinion, and it clearly invites the legislature to consider if any legally cognizable duty should be imposed on pregnant women. Nonetheless, the court makes some conclusions which could have a favorable impact on women.

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171. *Id.* at 277, 531 N.E.2d at 359.

172. *Id.* (quoting Green, *Foreseeability in Negligence Law,* 61 COLUM. L. REV. 1401, 1417-18 (1961)).

173. *Id.* at 277, 531 N.E.2d at 359.

174. *Id.* at 277, 531 N.E.2d at 360.

175. *Id.* at 278, 531 N.E.2d at 360 (quoting Renslow v. Mennonite, 67 Ill. 2d 349, 358, 367 N.E.2d 1250, 1255 (1977)).

176. *Id.* at 280, 531 N.E.2d at 361.

The court concluded that a fetus cannot be viewed as a completely separate entity from its mother, that a fetus does not have an assertable "right to be born whole" against its mother, and, in the absence of this "right to be born whole," that a mother does not have a legal duty to the fetus. These are the conclusions in *Stallman*, but each one is premised on important public policy considerations with potentially broad impact.

A. Analysis of Fetal Rights in Relation To Women's Rights

The conclusion that the fetus is not a separate entity, and therefore cannot assert rights against its mother contains two interwoven concepts. The *Stallman* court did not define the fetus as a person, but instead emphasized that the fetus is completely dependent on the woman for its existence.[177] Specifically, the court stated that "it is the whole life of the pregnant woman which impacts on the development of the fetus."[178] Because of this dependency, the court held the fetus was not a separate legal entity from the woman. The court astutely noted that viewing the fetus as a separate entity would create a legal fiction with far reaching implications. The end result of this legal fiction would be that a pregnant woman's every action could be subject to state scrutiny, thereby leading to unprecedented state intervention.

If the *Stallman* court had imposed maternal civil liability, the end result could have been excessive state intrusion into a pregnant woman's life. For example, the imposition of civil liability would have inevitably led to the imposition of maternal criminal liability.[179] This criminal liability would be intrusive, as it would enable the state to intercede to prevent a woman from engaging in criminal prenatal conduct. Furthermore, the fact that a woman's behavior could be so scrutinized, even for after-the-fact imposition of civil liability, will have a chilling effect on women's rights to autonomy and privacy.

In contrast to the *Stallman* decision's emphasis on limiting state scrutiny, fetal rights proponents view far reaching state scrutiny as an acceptable and necessary consequence of protecting fetal rights. This conclusion is based on the belief that a fetus has a right to be born whole, and therefore a mother is as liable for prenatal injury as a third party.[180] These conclusions are based on an alleged inevitable flow of logic.

The basic argument of the fetal rights proponents is that the courts have historically increased the scope of a fetus's rights to recover for prenatal injury, and that it is merely a logical progression that the mother should be held liable. It is argued that early common law illogically prevented a child from recovering for a prenatal injury on the belief that the fetus was

177. 125 Ill. 2d at 277, 531 N.E.2d at 359.
178. *Id.* at 278-79, 531 N.E.2d at 360.
179. *See supra* notes 62-77 and accompanying text.
180. *See supra* notes 78-99 and accompanying text.

merely a part of the mother.[181] *Bonbrest* reversed this trend, and clearly recognized that a fetus was not merely a part of the mother. Instead, the *Bonbrest* court held the fetus was separate to the extent that an injury to the mother could result in an injury to the fetus.[182] Eventually, the *Bonbrest* requirements for recovering for prenatal negligence were eroded. Thus, currently in Illinois, a cause of action exists for prenatal negligence against a third party tortfeasor regardless of whether the fetus is stillborn, is viable, or is conceived at the time of the injury.

In increasing prenatal negligence liability, courts recognized a fetus's "right to be born whole" as a basis for recovery against third parties.[183] The "right to be born whole," in addition to the *Roe v. Wade* articulation of a state's interest in the health of a viable fetus, has provided fetal rights proponents with ammunition for arguing that a woman should be held civilly and criminally liable for her negligent prenatal acts.

Citing the decisions recognizing prenatal negligence claims regardless of live birth or viability, the court discussions of a fetus's "right to be born whole," the recognition of a legitimate state interest in fetal well-being,[184] and the use of prenatal conduct as a basis for neglect proceedings,[185] the fetal rights proponents argued that the next logical step is that a fetus's "right to be born whole" can be asserted against its mother. In reaching this conclusion, proponents downplay the inescapable fact that a fetus and woman are physically inseparable until birth. While no constitutional right is absolute, and state intervention is permissible, the fetal rights proponents express no concern for the potential, unbridled limitation of women's rights that their position invites.

The *Stallman* court recognized the belief that a woman should subordinate her right to control her life when she becomes pregnant.[186] However, the court stressed that it was not the law of Illinois that a woman's rights were inferior to those of the fetus.[187] *Roe* and *Webster* recognize that a state has an interest in fetal well being and thus may regulate and limit a woman's right to abortion. However, the imposition of civil and/or criminal liability will have far greater effects on women's liberty than any abortion regulation, and may result in the woman's rights being subjugated to the fetus's rights. Allowing the imposition of maternal civil and/or criminal liability is tantamount to viewing the woman's rights as inferior to the fetus's rights. Specifically, because every aspect of a pregnant woman's life has the potential to harm the fetus, the woman's entire life is subject to state scrutiny.

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181. *See supra* notes 12-19 and accompanying text.
182. *See supra* notes 21-53 and accompanying text.
183. *See supra* notes 78-99 and accompanying text.
184. *See supra* notes 127-42 and accompanying text.
185. *See supra* notes 78-99 and accompanying text.
186. Stallman v. Youngquist, 125 Ill. 2d 267, 276, 531 N.E.2d 355, 359 (1988).
187. *Id.*

It was this potential for unbridled state scrutiny that formed the basis for the *Stallman* court not recognizing a woman's legal duty to her fetus.[188] The court expressly recognized that the creation of legal duties is a result of the judicial and legislative processes and is not premised solely on the variables of causation and foreseeability.[189] The *Stallman* court recognized that determinations of legal duties are not based purely on logical arguments in a sociopolitical vacuum.[190] In rejecting the approach that suggests logic dictates recognizing such a cause of action, regardless of public policy concerns, the court stated, "[l]ogic does not demand that a pregnant woman be treated in a court of law as a stranger to her developing fetus."[191]

Thus, the *Stallman* court did what the fetal rights proponents fail to do. It considered the evolving line of cases dealing with prenatal negligence. It analyzed their logical progression and then it viewed those cases in relation to pregnant women and public policy concerns. It articulated the important distinction between pregnant women and third party tortfeasors by recognizing that the imposition of liability on third parties did not interfere with the defendant's right to control his or her own life. The same imposition on pregnant women had a potential for a sweeping impact on their rights to control their lives.

Thus, the court's primary focus was on the protection of the woman's rights. However, the court did recognize that the state had a legitimate interest in protecting the health and the welfare of the fetus. The court indicated that this was also an important policy consideration. However, it concluded that this goal could more appropriately be achieved through preventive measures than after-the-fact imposition of civil liability. This policy of promoting fetal well being is of course the primary concern of fetal rights proponents. However, one may question, as the *Stallman* court did, how imposing liability will really promote fetal well-being.

B. Imposition of Maternal Liability Will Not Achieve Fetal Well-Being

The imposition of maternal civil liability will neither prevent fetal harm nor promote fetal well-being because it is imposed post-injury. Furthermore, such liability will rarely serve to compensate the child because in most cases there will be no source for money damages. If the fetal injury occurs in an accident caused by his or her mother's negligent driving, and she is also injured, then the child will be able to collect his or her money damages from the insurance company. However, in a case where a mother injures the fetus, there will be no source for damages. Therefore, the imposition of civil liability fails to satisfy its intended goals of promoting fetal well-being and/or compensating the injured child. The *Stallman* decision is not

188. *Id.* at 278, 531 N.E.2d at 360.
189. *Id.* at 277, 531 N.E.2d at 359-60.
190. *Id.* at 279, 531 N.E.2d at 360.
191. *Id.* at 278, 531 N.E.2d at 360.

alone in recognizing that civil liability would be ineffective in promoting fetal well-being. This conclusion is also reflected in the Missouri statute that was contested in *Webster v. Reproductive Health Services.*[192] In *Webster,* a statute which significantly limited a woman's ability to have an abortion contained a preamble which articulated when human life began and defined the fetal rights.[193] A plurality concluded that the preamble was simply a reflection of the state's preference for childbirth over abortion and that this was a value judgment the state was entitled to make.[194] Furthermore, Justice O'Connor concluded that any intimation that the preamble was unconstitutional was purely hypothetical.[195] Some may suggest that the Court's finding that the preamble was constitutional indicates the Court's willingness to favor the fetus's rights over those of the mother. Certainly, this is what the prochoice forces fear. However, while the *Webster* decision may not bode well for women's rights, it is a mistake to interpret this decision as suggesting that the state should impose maternal civil and criminal liability.

Fetal rights proponents, however, may attempt to use this decision as further support for imposing civil and/or criminal liability. The preamble, though, does not support this conclusion. While the statute defines life as beginning at conception, and declares that a fetus has rights, privileges and immunities available to all other persons under the Constitution, it also expressly states that the preamble should not be interpreted "as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care."[196]

Most legal scholars recognize that the state has a legitimate interest in promoting fetal well-being. This interest, however, does not necessarily lead to the conclusion that women should be held liable for their prenatal acts. The *Stalllman* decision was the first to articulate why this was not an appropriate conclusion. However, since *Stallman ,* the refusal to hold women liable for their prenatal conduct has been further expressed. The Missouri statute is one example. While the preamble's express intention was to declare fetal rights and to enable the state to protect those rights, the statute expressly rejected holding a woman liable for negligence for "indirectly harming her unborn child." Thus, with the exception of Grodin, there is no case which holds that a woman should be held civilly liable for her negligent prenatal acts. Furthermore, no one has successfully prosecuted a woman for her prenatal conduct. This further suggests that the case law does not support promoting fetal well-being by imposing liability.

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192. 109 S. Ct. 3040 (1989).
193. *Id.* at 3049 n.4 (quoting the preamble to Mo. REV. STAT. § 1.205.1 (1986)).
194. *Id.* at 3050.
195. *Id.* at 3059 (O'Connor, J., concurring).
196. MO. REV. STAT. § 1.205.1(4) (1986).

The refusal to impose maternal criminal liability is also reflected in public sentiment. A recent attempt in Illinois to impose criminal liability on a woman for her prenatal conduct promoted much public debate. In that case, a Rockford woman who abused cocaine was charged with the death of her infant. The case engendered much public attention. Specifically, an editorial in the Chicago Tribune strongly criticized the State's Attorney Office for prosecuting the woman.[197] The editorial comment recognized the important need for promoting fetal well-being, but it argued that the goal could not be met by imprisoning women. This editorial was just one rejection of such an approach.[198] In addition, the citizens of Illinois joined in rejecting this approach by refusing to indict the women on criminal charges.

The imposition of maternal criminal and civil liability is similar. The goal in both circumstances is to promote fetal well-being, and the end result in both is the restriction of women's rights. The legitimate and important goal of protecting fetal well-being can be more readily achieved through preventive prenatal programs. The *Stallman* decision recognized that imposing maternal civil liability would not realistically improve fetal well-being and would significantly infringe on women's rights. The state has less restrictive means of achieving these goals, and is therefore required to do so. The court in *Stallman* recognized that once it allowed maternal civil liability, there would be no bright line to draw.

C. Stallman *and Previous Common Law*

While the court's decision in *Stallman* may seem inconsistent with prior case law, it is in fact consistent to the extent that prior case law is applicable.[199] While proponents of maternal liability have relied on the *Renslow* court's description of duty as neither "sacrosanct" or "static," such a fluid definition of duty can obviously be interpreted in two ways. It can either lend force to imposing liability, or it can reject such liability on the basis that any such duty is against public policy. The key is that a nonstatic concept of duty suggests flexibility and emphasizes public policy concerns.

The fetal rights theorists miscalculated the direction the *Renslow* opinion would take. This miscalculation was based on a failure to heed the court's warning that it would draw the line on expanding liability in the appropriate case. The *Stallman* court concluded that the imposition of maternal civil liability was the point at which such a line would be drawn. All previous

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197. *Cocaine babies: The real issue*, Chicago Tribune, May 14, 1989, § 4, at 2.

198. *See also* Sherman, *supra* note 64, at 1, col. 1 ("jail is a ludicrous place to insure fetal health"); *Mother versus Child,* 84 A.B.A.J., Apr. 1989, at 84; Note, *The Pamela Rae Stewart Case, supra* note 2, at 9.

199. The *Stallman* opinion is consistent with *Renslow's* discussion of the articulation of duty as a fluid concept. Furthermore, the *Stallman* opinion draws on language in *Renslow* for the basis of limiting liability.

Illinois case law, including *Renslow,* dealt with third party tortfeasors. In *Stallman*, the court's clear distinction between third party tortfeasors and a pregnant woman drew a demarcating line which limits the applicability of prior case law.

To the extent that prior case law applies, *Stallman* is consistent. However, as *Stallman* is a case of first impression, future courts will still encounter novel issues. In these cases, public policy must direct the courts.

IV. IMPACT

A. Women's Rights Safeguarded

The court in *Stallman v. Youngquist* declined to impose civil liability on a mother because of the potential for excessive state scrutiny into women's everyday activities. Many commentators advocating maternal liability indicate that liability could be incurred for a vast array of conduct including household accidents, motor vehicle accidents, maternal nutritional deficiencies, maternal drug ingestion, cigarette smoking, exposure to infectious diseases, unwarranted use of amniocentesis, and immoderate exercise or sexual intercourse during the last month of pregnancy.[200]

This exhaustive list suggests the potential for extreme state intervention and infringement of women's rights. As previously discussed, the imposition of civil liability could result in excessive state intrusion. Furthermore, it is likely that any imposition of civil liability will have a ripple effect. Once the state holds women civilly liable for their prenatal acts, it becomes merely a logical progression to hold women criminally liable. The imposition of criminal liability will invite additional state scrutiny and intervention into a woman's everyday life.[201] If the state can hold a woman criminally liable, they may scrutinize her every act to determine if there is any danger or damage to the fetus.[202]

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200. *See* Note, *Parental Liability, supra* note 2, at 73-75.

201. In the Stewart case, the mother's sexual activity against doctor's orders, her alleged use of illegal drugs during pregnancy, and her alleged failure to go to the hospital when heavy bleeding began formed the basis for the state filing a misdemeanor charge against her. This charge alleged that the mother failed to provide medical attention and remedial care to her child. Note, *The Pamela Rae Stewart Case, supra* note 2, at 227. While this action was unsuccessful, there are those who suggest that a woman's prenatal conduct should form the basis for criminal prenatal abuse charges. Dr. Margery Shaw, a vociferous proponent of fetal rights, believes that women who abuse illegal drugs while pregnant should be held criminally liable for distribution of illegal drugs to the fetus. *See Mother versus Child, supra* note 198, at 84.

202. In 1985, a judge in Waukesha County, Wisconsin ordered a pregnant teen-ager held in a juvenile facility because she wasn't following her doctor's directions. A higher court ruled the action was improper. *See Mother versus Child, supra* note 198, at 84. However, if proponents for imposing criminal liability succeed, such actions could be upheld as a remedy to deter criminal prenatal abuse. There are instances where judges have imprisoned pregnant women who were abusing drugs under the guise of penalties for other offenses. *Id.* at 88. However, one must question whether society wishes to adopt a social policy of imprisoning women as means of achieving fetal well-being.

The court's refusal to impose civil liability protects women's privacy rights by avoiding the chilling effect such liability would impose and by preventing further entrenchment of women's rights. This refusal to open the door to civil liability suggests that the imposition of maternal criminal liability for prenatal acts will not be forthcoming.

B. Fetal Well Being Encouraged

Furthermore, while the court recognized the important state interest in fetal well-being, it suggested that prevention may be the best approach. This sociopolitical approach to the problem may encourage the legislature to enact laws providing comprehensive prenatal care and drug rehabilitation programs which will more effectively achieve fetal and child well-being.

V. CONCLUSION

Medicine has long recognized the relationship between good prenatal care and healthy newborns. Promoting fetal well-being is, and should be, a state concern of significant proportion. Infant mortality rates remain disturbingly high nationwide.[203] In Illinois, an infant mortality rate of 11.6 for every 1,000 live births placed it among the highest of the northern industrial states. Chicago's infant mortality rate of 16.6 per 1000 live births is higher than nearly every industrialized nation, and as high as many third world countries. The rates are even higher among the black population.[204]

There is little dispute that the state has an interest in promoting fetal well-being. The question is, however, what is the most effective method of achieving that goal? Increased availability of prenatal care and prenatal care which encompasses a multidisciplinary approach is more likely to achieve success in improving fetal outcomes.[205]

Furthermore, if criminal liability is imposed, the health care system could become more of a police state than a system of providing care. A focus that seeks to achieve fetal well-being by penalizing women may only result in deterring women from seeking the prenatal care they so desperately need. If fetal well-being is the ultimate goal, the state must focus on providing the comprehensive prenatal care and education needed to realistically impact fetal well-being. The *Stallman* decision prevents imposing

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203. *First Steps to Improving Baby's Odds of Survival are up to Mom,* Chicago Tribune, Jan. 29, 1989, § 19, at 2, col. 5 (discusses Chicago and national infant mortality rates and the problems that lead to such high infant death rates).

204. *Id.*

205. Local community centers may be able to combat infant mortality rates by providing a multidisciplinary approach to prenatal care. One example of just such an attempt involves a south side Chicago medical center. This clinic stresses comprehensive care as the solution to the infant mortality problem. The clinic provides, in addition to medical services, a nutritionist, social workers, chemical dependency counselors and dentists.*See Good Care Starts Before Birth,* Chicago Tribune, Jan. 29, 1989, § 19, at 2, col. 3.

civil liability and encourages a preventive approach. This approach properly emphasizes fetal well-being while safeguarding a woman's rights.

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